

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE GAMBLING CONTROL BOARD

In the Matter of the
Lawful Gambling License of
Thief River Falls Amateur
Hockey Association

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on June 17, 1993, at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota. The record closed July 12, 1993, upon receipt of the final post-hearing brief.

John Garry, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Gambling Control Board (Board). Kurt J. Marben, Charlson, Marben & Jorgenson P.A., 100 West 2nd Street, P.O. Box 506, Thief River Falls, Minnesota 56701-0506, appeared on behalf of the Thief River Falls Amateur Hockey Association (Licensee).

This Report is a recommendation, not a final decision. The Board will make the final decision after a review of the record which may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Board. Parties should contact Harry W. Baltzer, Director, Gambling Control Board, Suite 300 South, 1711 West County Road B, Roseville, Minnesota 55113, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether illegal gambling occurred at a premises at which Licensee had a premises permit to conduct lawful gambling.

2. If such illegal gambling did occur, whether Minn. R. 7861.0050 requires Licensee's premises permit for that premises to be suspended for one year.

3. Whether Minn. R. 7861.0050 requiring suspension of Licensee's premises permit if illegal gambling occurs upon the premises is valid.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee is an organization licensed by the Board to conduct lawful gambling. Its current lawful gambling license took effect September 1, 1992 and expires August 31, 1993. Licensee is a non-profit organization that operates the youth hockey program at Thief River Falls, Minnesota, a community in northwestern Minnesota with a population of approximately 8,500. T. 84. The organization has been in existence for at least 20 years. T. 88. There are about 230 children in the program from ages 4 to 14 and the association provides them with equipment, coaches, ice time, games, tournaments, scheduling and everything necessary for a youth hockey program. T. 84-85.

2. During the last hockey season, from approximately September 1992 through April 1993, Licensee spent approximately \$87,000 on its youth hockey program. T. 85-86.

3. A large part of Licensee's operations are funded through the lawful gambling it conducts. It has conducted charitable gambling at the Rusty Nail Bar, 307 North Main, Thief River Falls, Minnesota, for 8 or 9 years. T. 86. Its current premises permit for the Rusty Nail took effect September 1, 1992 and expires August 31, 1993. Licensee sells pull tabs and operates a paddle wheel at the Rusty Nail. Ex. 2, T. 106-107. Licensee has sold pull tabs at Lon's, a restaurant and bar in Thief River Falls, for about two years. T. 87, 108. Licensee also had a premises permit for the Huck Olson Arena in Thief River Falls at which it conducted a raffle during the winter of 1992-93. Ex. 12-15, T. 99 and 127-128.

4. Licensee's monthly Lawful Gambling Activity Summary and Tax Return and Schedule A's attached thereto for the period of June 1992 through April 1993, Exs. 5-15, show the following:

Month	Rusty Nail Pre-taxes <u>Profit</u> ¹	Lon's Pre-taxes <u>Profit</u> ¹	Arena Pre-taxes <u>Profit</u> ¹	Collective After-taxes <u>Profit</u> ²	Lawful and Approved <u>Expenditures</u> ³
6/92	9,989	794		353	15,582
7/92	10,222	4,163		10,079	2,343
8/92	11,061	3,677		11,531	1,321
9/92	6,706	3,952		7,279	1,362
10/92	11,017	2,745		10,209	8,544
11/92	9,215	1,640		5,702	6,208
12/92	7,676	3,022		4,241	6,517
1/93	6,945	492		(26)	17,761
2/93	8,217	(864)	7,000	7,234	7,780

3/93	5,129	1,945		(1,261)	7,076
4/93	<u>8,316</u>	<u>3,579</u>		<u>2,116</u>	<u>2,110</u>
TOTALS	94,493	25,145	<u>7,000</u>	57,457	76,606 ⁴
% of					
Total	74.6%	19.9%	5.5%		

Beginning Profit Carry-over ⁵	<u>31,795</u>
Available for Expenditure	89,252
Expenditures ⁶	<u>76,604</u>
Ending Profit Carry-over ⁷	12,647 ⁴

- Notes:
1. Schedule A, line 12 minus line 35.
 2. Summaries, line 36 (prior to deduction of federal wagering taxes).
 3. Summaries, line 40 plus line 41.
 4. Difference due to rounding.
 5. 4/93 Summary, line 43.
 6. Includes \$3,560 of federal wagering taxes.
 7. 6/92 Summary, line 37.

5. Based upon the figures in the foregoing table, the Rusty Nail is responsible for 74.6 percent of Licensee's pre-tax lawful gambling profits. During the 11 months shown in the table, and assuming that the taxes may be pro-rated on the same basis, the Rusty Nail produced 74.6 percent of the Licensee's after-tax profits of \$57,457, or \$42,862. Averaging that amount over 12 months indicates that lawful gambling at the Rusty Nail generates profits of approximately \$46,759 per year. That is equal to approximately 54.6 percent of an annual budget of \$87,000.

6. The table in Finding No. 4 indicates a decline in gambling revenue for Licensee, particularly at Lon's. Licensee attributes a significant part of the decline to the opening of a casino just south of Thief River Falls, which is closer to Lon's than the Rusty Nail and which could be expected to attract the clientele of Lon's more than the clientele of the Rusty Nail.

7. Licensee's Schedules C and D for the period of June 1992 through April 1993, Exs. 16-26, set forth the following allocations of Licensee's lawful purpose and Board-approved expenditures:

Federal Month	Combined		Rusty Nail		Lon's	
	<u>Expend.</u>	<u>Expend.</u>	<u>Wagering Tax</u>	<u>Expend.</u>	<u>Wagering Tax</u>	
6/92	15,582 ¹	10,330	330	5,703	329	
7/92	23,343	2,099	330	244	0	
8/92	1,321	1,263	323	58	0	
9/92	1,362	31	321	1,331	0	
10/92	8,544 ²	3,449	293	0	0	
11/92	6,208	4,332	318	1,876	0	
12/92	6,517	4,489	282	2,029	0	
1/93	17,761	14,352	252	3,409	0	
2/93	7,780	7,615	276	165	0	
3/93	7,076	5,132	0	1,944	218	

4/93	<u>2,110</u>	<u>587</u>	<u>244</u>	<u>1,524</u>	<u>0</u>
TOTALS	76,606 ³	53,679	3,013 ³	18,283	547
Fed.					
Wagering					
Tax	<u>3,560</u>	<u>3,013</u>		<u>547</u>	

Net			
Expend.	73,046	50,666	17,736
% of			
Total		74.1%	25.9%

Notes: 1. \$450 extra allocated on Schedule C's (Ex. 16), amended out of Summary (Ex. 5).
 2. \$5,095 in expenditures on Summary (Ex. 9) not on Schedule C's or D's (Ex. 29).
 3. Rounding errors.

8. It can be seen on the table that Licensee spent \$73,046 on youth hockey over the eleven-month period out of lawful gambling proceeds, which was substantially more than the \$57,457 it made over the same period and which required it to use a substantial portion of its profit carry-over of \$31,799 from prior periods. There is no particular significance to the allocation of the expenditures to the Rusty Nail or Lon's (there was no allocation to the Arena raffle), but it is noted that the allocation is 74.1 percent to the Rusty Nail which corresponds to its proportion of the pre-taxes profit generated. Assuming that that portion is appropriate and recognizing that much of the expenditures were paid out of prior period profits, it can be said that approximately \$50,666 of the expenditures over the eleven-month period can be attributed to gambling proceeds from the Rusty Nail.

9. At approximately midnight on January 25, 1993, James Arlt and James Schultz, both Special Agents for the Gambling Enforcement Division of the Department of Public Safety, entered the Rusty Nail for the purpose of investigating whether an illegal lottery was being conducted there. The Super Bowl was to be held the next Sunday, January 31, 1993. Acting on tips that had been received November 18, 1991, and shortly before the Super Bowl in January of 1992, they were investigating whether numbers on sports boards were being sold at the bar. They were investigating other bars in the area around that time as well. T. 26-30.

10. Sports boards, as that term was used by Agent Arlt and in this proceeding, are used to award cash or merchandise prizes based on the scores of football games or other sporting events and, in Agent Arlt's experience, are generally found in bars. They usually consist of a 10 x 10, or sometimes a 5 x 5, grid of squares drawn on a sheet of paper or other material. Across the top of the grid and down the left side of the grid, concealed by paper or tape, are the numbers 0 through 9 in random order, one number per column or row. In the case of a 5 x 5 grid, there are two numbers per column or row. The name of the team, or a league in the case of the Super Bowl, is written at the top of the grid to correspond with the numbers across the top and another is written to the left side to correspond with the numbers going down the left side of the grid. The sports board is typically labeled with the designation of the game.

it applies to, the cost of purchasing a square and the prizes that will be awarded. On football boards, prizes are usually awarded based on the scores at the end of each quarter or sometimes at the half and end of the game. The numbers across the top and down the left side are kept concealed until all the squares on the board are sold. When the sporting event is played, winners are determined by the intersection of the last digit of the score of the team designated at the top with the last digit of the score of the team designated at the left side. The person whose name is written in

that square wins the prize for that particular quarter. Agent Arlt considers sports boards to be illegal lotteries. T. 18-26.

11. The main room of the Rusty Nail is rectangular in shape with an oval shaped bar in the center. A dance floor and stage is located to the left of the main room, tables are located along the left side of the room and to the rear of the bar. The kitchen is located at the back end of the room. Along the right side at the rear is the Licensee's pull tab booth and paddle wheel area. From there to the front of the main room, along the right side wall, are customer booths. The entrance is located on the right side of the front wall. Ex. 2. In the center of the oval bar is a service island with some sort of riser on which liquor bottles are displayed. T. 35-36.

12. Agents Arlt and Schultz entered the Rusty Nail at about midnight January 25, 1993, by the front door, went to the left past the dance floor to the left side of the bar nearest the front of the room and sat on the bar stools there. The agents were in plain clothes and did not identify themselves as officers. They each ordered a drink from the young male bartender working at the time behind the bar. They paid the bartender for the drinks and the bartender put the money from the drinks in a regular cash register. T. 30-31. Ex. 2 (blue x shows Agents Arlt's location).

13. On the end of the service island toward the left front of the bar was a brown box with a drawer in it. To the left of that and leaning against the box were several pieces of paper standing up on end. The one at the far left was bent over and Arlt observed the words, "Football Pool" written on one side of it and what appeared to be a 5 or a 2 on what he could see of the other side of the paper. T. 32-41; Ex. 2. Arlt then asked the bartender if there was any room left on the \$5.00 board. The bartender turned, took the sheet of paper on the left that Arlt had observed and placed it on the bar in front of Arlt. The sheet of paper was a 100-square sports board with approximately 25 of the squares filled in with peoples' names. There was tape along the top and left sides of the grid with "AFC" written at the top or left side and "NFC" written at the other. Also written on the sheet were number 5 for the dollar amount, payoff figures and the words, "Super Bowl." Arlt signed a square with the name Jimmy Gilmore, which is the undercover name he uses, and gave the bartender \$5.00. The bartender put the sports board back where it had been and put the \$5.00 in the brown box beside the papers and not in the cash register in which the payment for the drinks had been placed. T. 40-48.

14. Arlt then asked the bartender what the other boards were for and the bartender stated that they were for the various promotional items that were in the bar, including a "Bud Bowl" jacket, caps, football and Super Bowl pins. These items were displayed on the bar, the center island and on some sort of structure that was built down from the ceiling, apparently over the bar. The promotional items had been provided by Budweiser in connection with the Super Bowl. T. 51-54. The Rusty Nail has its own jackets, caps and other

promotional items that it sells, which are also displayed on the structure of the bar. T. 112. The bartender stated that the other boards cost 50 cents a dollar per square and showed Agent Arlt the Super Bowl pins. Arlt asked to buy a chance on the pins. The bartender searched through the sheets standing next to the box at the end of the island, took out one of

the sheets and gave it to Arlt. It was a 100-square sports board for the St. Louis Bowl with one pin awarded for each quarter. Arlt signed the square using the name Jimmy Gilmore again and gave the bartender a dollar. Agent Schultz also bought a square for a dollar and put his undercover name in it. The bartender put the money in the brown box and replaced the sheet with the others stacked next to the box. T. 55-64.

15. Agent Arlt asked the bartender whether they had any bigger boards and was told by the bartender that they would after the smaller boards sold out, which would be toward the end of the week. T. 64. Arlt considered the sports boards to be illegal lotteries, but made no arrest and seized no evidence at the time. He and Agent Schultz finished their drinks and left. Arlt returned to the Rusty Nail with a search warrant and three officers from various jurisdictions on January 29, 1993, at about 11:30 a.m. At that time Arlt met James Efeland, a co-owner of the bar, gave him a copy of the search warrant and advised him why they were there. Efeland told Arlt that they wouldn't find any sports boards there and they did not. The brown box was still there with some money in it, but there were no sports boards present. Arlt and the other officers left the bar without taking any evidence or making any arrests. T. 65-69. From January 26, 1993, to January 29, 1993, Arlt and two other agents in Thief River Falls executed six search warrants in area bars.

16. Due to the arrangement of the bar and the height of the center island, it is not possible to see the brown box and the sports boards next to it from the right side of the bar or from Licensee's pull tab booth and paddle wheel area.

17. Neither Licensee nor its agents participated in or had any knowledge of the conduct of any illegal gambling that took place in January 1993, in the Rusty Nail.

18. Licensee generates some revenue for its operation by operating ice cream stands and candy stands with volunteer workers at the two ice arenas. It receives a limited amount of cash donations from the VFW and the Eagles Clubs in Thief River Falls and in kind support from the American Legion and Elks Clubs in Thief River Falls. T. 88. Licensee's officers and gambling managers believe that there are no other potential sites in the Thief River Falls area where they could operate a lawful gambling operation. They believe the only realistic potential sites are the eight bars in town. Four of those are service clubs, the American Legion, VFW, Elks and Eagles, which operate their own lawful gambling. There are four public bars, the Rusty Nail, Lon's, Swede's and the Best Western. Licensee operates the charitable gambling presently at the Rusty Nail and Lon's and other organizations operate lawful gambling at Swede's and the Best Western. T. 89-90. It is also the opinion of Licensee's officers that it would be very difficult for Licensee to continue to operate the youth hockey program it does without the revenue from lawful

gambling at the Rusty Nail. Licensee does not have any significant amount of money in any sort of savings accounts. T. 90.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 349.151, subd. 4(a)(12) and 14.50.

2. The burden is upon the Board to prove the facts at issue in this matter by a preponderance of the evidence. Minn. R. 1400.7300, subp. 5.

3. Minn. Stat. § 609.75, subd. 1(a), provides, in relevant part:

A lottery is a plan which provides for the distribution of money, property or other reward or benefit to persons selected by chance from among participants some or all of whom have given a consideration for the chance of being selected. . . .

4. The sports boards on which Agent Arlt purchased chances at the Rusty Nail in the early morning of January 26, 1993, were lotteries within the definition of Minn. Stat. § 609.75. They contain the three essential elements of the lottery: (1) a prize, (2) selection of winners by chance, and (3) consideration given by some or all of the participants for the chance to obtain a prize. State v. Moren, 48 Minn. 555, 51 N.W.2d 618 (1992); State v. Schubert Theatre Players Co., 203 Minn. 366, 281 N.W. 369 (1938). Minn. Stat. § 609.755 provides, among other things, that whoever sells or transfers a chance to participate in a lottery is guilty of a misdemeanor. Minn. Stat. § 609.76, subd. 1, makes it a gross misdemeanor to, among other things, conduct a lottery, or, with intent to conduct lottery, possess facilities for doing so.

5. The sale of squares on sports boards to Agent Arlt and Agent Schubert by the bartender of the Rusty Nail on July 26, 1993, constituted the sale of chances in a lottery and the conduct of a lottery and was illegal gambling.

6. Minn. R. 7861.0050 (Supp. 1992) states:

Subpart 1. **Prohibition.** Illegal gambling may not be conducted at a premises for which a licensed organization has a premises permit to conduct lawful gambling.

Subp. 2. **Discipline.** The board shall suspend an organization's premises permit for one year for any violation of this part. The board shall suspend or revoke an organization's license if the organization or its agents participated in the illegal gambling prohibited by subpart 1.

7. Minn. R. 7861.0040, subp. 9 (Supp. 1992), regarding the issuance and denial of premises permits, provides that the Director shall deny a premises permit to any person who is convicted of a crime involving

permit when the proposed site is a site where illegal gambling has occurred within the last 12 months or the lessor has been convicted of illegal gambling within the last 12 months. Minn. R. 7861.0040, subp. 10 (Supp. 1992), regarding renewals, provides that an application for renewal of a premises permit must be considered in the same manner as an application for an

initial permit pursuant to subp. 9. The lease agreement form LG202 used by organizations to lease space to conduct lawful gambling under a premises permit contains a provision stating:

The lease shall be terminated immediately for any gambling, liquor, prostitution or tax evasion violations occurring on the premises.

See Ex. 3.

8. Minn. R. 7861.0050, subp. 2 (Supp. 1992), requires that Licensee premises permit for the Rusty Nail be suspended for a period of one year. The language of the rule is clear and mandatory. Having adopted the rule, the Board, and therefore the Administrative Law Judge, do not have discretion to disregard it. Springborg v. Wilson & Co., 245 Minn. 489, 73 N.W.2d 433 (1955); Housing and Redevelopment Auth. of Waconia v. Chandler, 403 N.W.2d 708 (Minn. App. 1987). Thus, the premises permit must be suspended for one year.

9. Licensee argues that Minn. R. 7861.0050 is unconstitutional. The Board and the Administrative Law Judge lack subject matter jurisdiction to determine the validity of the rule. It was stated in Mammenga v. Dept. of Human Services, 442 N.W.2d 786 (Minn. 1989), that the validity of a rule may be challenged in a contested case. However, it has long been held that administrative agencies lack jurisdiction to determine the validity of the statutes and rules since that power is vested in the judicial branch of government. Neeland v. Clearwater Memorial Hosp., 257 N.W.2d 366 (Minn. 1977); Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869 (1955).¹ A challenge to a rule on its face may be done through collateral attack on the validity of the rule upon judicial review of a contested case. Beck, Bakken & Muck, Minnesota Administrative Procedure, § 25.12.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Gambling Control Board suspend for one year the premises permit of the Thief River Falls Amateur Hockey

¹ It is permissible, however, for an agency or an administrative law judge to determine a constitutional question in the interpretation of a statute or its application to particular facts, taking into account relevant judicial decisions. Petterssen v. Commissioner of Employment Services, 306 Minn. 54, 236 N.W.2d 168 (1975); Beck, Bakken & Muck, Minnesota Administrative Procedure § 10.2.1, note 12.

Association to conduct lawful gambling at the Rusty Nail Bar, 307 North Main
Thief River Falls, Minnesota, pursuant to Minn. R. 7861.0050 (Supp. 1992).

Dated this 11th day of August, 1993.

/s/

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to send its final decision upon each party and the Administrative Law Judge by first class mail.

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Brennan & Associates
Court Reporters

MEMORANDUM

Licensee challenges the sufficiency of the evidence that sports boards were being sold at the Rusty Nail at any time because no one was arrested, no evidence was seized, no criminal charges were ever brought and the bartender who sold the squares was not identified and thus, that there was no evidence corroborating Agent Arlt's testimony. Nothing requires corroboration. Agent Arlt was very believable in his testimony. He was specific and matter of fact. There was no contrary testimony whatsoever to the statements he made. It is quite clear that at least one bartender at the Rusty Nail was selling numbers on sports boards and, because some of the prizes consisted of promotional items provided by Budweiser, it is most probable that the bar itself was involved in the conduct of the illegal lottery. The Rusty Nail will be prohibited by the rules from having lawful gambling for one year and, correspondingly, Licensee cannot conduct lawful gambling there for a year. Loss to Licensee is the result of the Rusty Nail's illegal conduct.

SMM